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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

MARION ODELL MORROW,

Petitioner,

VS.

STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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MARION ODELL MORROW,

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VS.

STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

QUESTIONS PRESENTED FOR REVIEW

(1) Whether Defendant's due process rights were violated when defense counsel, in a Habitual Criminal trial, stipulated that Defendant had seven prior felony convictions, thus depriving the Defendant of any opportunity to challenge the use of these prior convictions in determining his sentence.

(2) Whether the identification procedure was so impermissably suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, the Appellant/Defendant below, prays that a Writ of Certiorari issue to review the February 2, 1981, opinion of the Supreme Court of Arkansas.

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OPINION BELOW

On February 2, 1981 the Supreme Court of Arkansas entered an opinion, with a dissenting opinion by John I. Purtle, Associate Justice, *Morrow v. State,* —— Ark. ——, 610 SW2d 878, denied the appeal of the Petitioner. A copy of the Court's opinion is printed herein as Appendix "A".

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(1) The date of the judgment sought to be reviewed is February 2, 1981.

(2) The statutory provision conferring jurisdiction on this Court is 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

The Petitioner Morrow was arrested in Stillwell, Oklahoma, on May 11, 1979, shortly after a burglary and theft of property at a residence in Washington County, Arkansas. He was charged with these offenses, and further charged under the Arkansas habitual criminal statute (Ark. Stat. Anno. 41-1001 et seq.) by an Information dated May 14, 1979.

There was strong circumstantial evidence. Morrow was arrested while driving a car observed at the crime scene, and stolen property from the residence was in plain view in the vehicle. However, he offered a vigorous defense, suggesting alibi and that another individual committed the crime.

Mrs. Grace Johnson (a neighbor) was the only eyewitness to the crime. She was shown a photographic lineup shortly after the crime, but could not identify the Defendant. Later, a private investigator hired by the Defendant showed her photographs of him, but she could not make positive identification. Again, on Friday before the trial began on Monday, the Deputy Prosecuting Attorney asked her to identify Morrow from a photograph, but she could not. At the trial, she identified Morrow, but with some reservations.

The Trial Court admitted into evidence a crude sketch which Mrs. Johnson had made of the person who committed the crime. The drawing shows a subject (a) wearing a cap, and (b) with a pullover shirt with dark patches on the shoulders. The drawing almost certainly was made after Mrs. Johnson was shown a photograph of the Defendant

wearing such a shirt, that photograph having been made at the time of his arrest.

At trial, the photograph of the Defendant made at the time of his arrest was admitted without objection. However, the Defense objected to the admission of her "doodled" drawing, pleading that the exhibit was offered to give improper support to an identification that was already impermissibly unreliable.

The Arkansas habitual criminal statute, like those of many other states, calls for a bifurcated trial. After the jury returned a verdict of "guilty", they were to hear evidence concerning prior felony convictions. At this point, the Defendant's attorney stipulated that the Defendant had committed seven prior felonies. Copies of seven judgments were given to the jury as exhibits. These are abstracted as Appendix "C" to this Petition. Three of the convictions are without the assistance of counsel. In a fourth, assistance of counsel was waived. Two are dated the same date and appear to arise from a single episode. No testimony concerning the convictions was presented.

The jury found that Morrow had committed "two or three prior felonies", and sentenced him to 10 years on the burglary charge and to five years on the theft charge to run concurrently.

The judgment of the Circuit Court was timely appealed to the Supreme Court of Arkansas.

TIME AT WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

The two points presented in this petition have been timely presented in the Trial Court and the Supreme Court of Arkansas.

The question of improper identification was raised in the Trial Court by the objections of counsel, and was presented again on Appeal to the Supreme Court of Arkansas.

The question concerning stipulation as to prior felony convictions was presented on appeal to the Supreme Court of Arkansas.

ARGUMENT

CONCERNING STIPULATION AS TO PREVIOUS FELONY CONVICTIONS

The Eighth Circuit has previously spoken to this issue in *Cox v. Hutto*, 589 F.2d 394 (8th Cir. 1979) (Cox I) and *Cox v. Hutto*, 619 F.2d 731 (8th Cir. 1980) (Cox II). We ask this Court to grant Certiorari to announce a rule of general application. This is a matter of more than local interest, since many states have habitual criminal statutes similar to that of the State of Arkansas employed in this case.

We further submit that the better rule of law would be as follows:

> "When the State seeks to prove habitual criminal status by introducing copies of prior felony conviction judgments or penitentiary commitments, the Defendant must be accorded every opportunity to challenge or explain the circumstances of the conviction. The Court itself should exclude those which are found lacking, as for absence of assistance of Counsel. A stipulation as to prior felony conviction should be permitted only after the Court ascertains from the Defendant that he knowingly and voluntarily agrees to the stipulation." (Adapted from *Cox I* and *Cox II*, above.)

Nowhere in the record is there any indication that the appellant was asked by the trial court if he knowingly and voluntarily agreed to the stipulation. His counsel's stipulation amounted to a waiver of appellant's right to force the State to bear its burden of proving prior convictions, *McConahay v. State*, 257 Ark. 328, 516 SW2d 887 (1975) and of his right to rebut the State's evidence, Ark. Stat.

Ann. §43-2330.1(2) (Repl. 1977). A previous conviction must be proved beyond a reasonable doubt. *Leggins v. State*, 267 Ark. 293, 590 SW2d 22 (1979) and because of the penal nature of the habitual criminal statute, the State is accountable for perfect compliance with regard to the evidence presented to support the habitual charge. *Roach v. State*, 255 Ark. 773, 503 SW2d 467 (1973). Since all that remains in a habitual proceeding after a stipulation of prior convictions is the judgment and setting of punishment, the stipulation has been found to be the functional equivalent of a guilty plea. *Cox v. Hutto*, 589 F.2d 394 (8th Cir. 1979). This is presumptively prejudicial unless the State can show — absent the stipulation — it possessed at the time of the trial evidence proving the prior convictions essential to support appellant's sentence. *Cox, supra.* While the State had certified conviction records, they were defective for the reasons set out below. Also, the appellant was prejudiced by the stipulation by his inability to rebut the State's evidence on the convictions.

The record shows that appellant had an attorney in only three of the seven stipulated convictions. (T. 414, 415, 419) Of the four convictions where he did not have counsel, there was one case where the record recites that he waived the assistance of counsel. (T. 420) There were, then, three convictions where the record does not show appellant had the assistance of counsel or validly waived counsel. (T. 413, 416, 417) Convictions of this nature are not acceptable in applying the habitual criminal statute. *Klimas v. State*, 259 Ark. 301, 534 SW2d 202 (1976).

Overlooking appellant's objections regarding the stipulation, it could be said that throwing out the three uncounseled convictions would still leave four convictions,

and these would be ample to support the jury's habitual finding in this case. (T. 449, 450) This is what occurred upon remand to the district court in the *Cox* case, but the United States Court of Appeals for the Eighth Circuit affirmed the granting of habeas corpus relief on the theory that there was no way to speculate that the error in originally accepting the stipulation did not affect the jury's deliberation. *Cox v. Hutto*, 619 F.2d 731 (8th Cir. 1980).

In this case, although the jury only found appellant guilty of two or three previous felonies despite the stipulation, it cannot affirmatively be said the defective stipulation did not affect the jury's deliberation and did not deny appellant the opportunity to make his challenge before a jury to the use of the prior convictions. *Cox II, supra.*

The error in this situation was not harmless, in light of the peculiar action of the jury in finding appellant guilty of two or three prior convictions when it was looking at stipulated evidence of seven previous convictions. This particular result, when viewed in connection with the lengthy exchange between the court and jury (reproduced below), can lead to only one conclusion — the jury wanted to show some mercy or compassion in the sentencing.

If the jury found four or more convictions, the sentence range would be 20 to 40 years; by finding two or three priors, the range went to five to thirty years — and the sentence returned was at the lower end of that range — ten years on the burglary charge and five years on the theft of property conviction. Further, the jury specified concurrent sentences. Petitioner does not feel this Court can assume that the sentence would have been the same if the jury had been presented with evidence of only four convictions, under the circumstances.

To illustrate the jury's difficulty in applying the habitual criminal statute, we have reproduced as Appendix "D" part of the transcript setting out the dialogue between court and jury during their deliberations.

CONCERNING IDENTIFICATION PROCEDURE

This Court, as well as the several Courts of Appeal, have made it clear that unnecessarily suggestive pretrial confrontation procedures, standing alone, do not violate due process, and that reliability is the linchpin in determining the admissibility of identification testimony. (E.g., *Manson v. Brathwaite,* 432 U.S. 98 (1977).

The Defendant contended at his trial that another person committed the burglary, and that he purchased the stolen property from that subject. While there was sufficient evidence to convict the Defendant of theft by receiving, a less serious offense, Mrs. Johnson's identification was critical in proving the crimes of burglary and theft, with which the Defendant was charged.

Mrs. Johnson said she saw a man place articles from her son's home into an automobile, and watched him drive away. She was shown a total of five photographs of the Defendant on three occasions from the day of the crime to shortly before the trial. From the photographs, she was unable to positively identify the appellant as the man she saw, yet at the trial she did, albeit with some hesitation.

This argument centers on the admission into evidence over objection, of a sketch she said she made, Exhibit "J"; particularly when viewed in connection with Exhibit "O", a photograph made of appellant on the day of the crime, which was admitted without objection. Reproductions of the two exhibits are included with this petition.

The appellant's objection to admission of the sketch was that it had not been established whether Mrs. Johnson drew it before or after she saw Exhibit "O". The prosecution's purpose in seeking admission of the sketch was to show the similarity between the dark stripes on the shoulders of the sketch and the dark stripes on the shirt the appellant was wearing when he was apprehended some thirty minutes after the crime, Exhibit "O".

Asked about the darker lines on the man's shoulders of her sketch, she first responded that she was just trying to figure out the colors; somehow she thought the man might have had on a red shirt and she put it there to see what it would look like.

Not satisfied with that response, the prosecutor continued:

Q. I notice that it looks like a line on each shoulder. Did you have any particular idea in mind when you drew that, ma'am?

A. I don't know why unless I thought he might have had a two-tone shirt or something.

Q. Pretty spontaneous drawing, then, isn't it? Is that what you are saying? You were just drawing it from thought?

A. Uh-huh.

The Court denied admission of the sketch on the appellant's previously mentioned objection.

The sketch was admitted during the examination of Officer Rexford, who testified that Mrs. Johnson told him she made the sketch. He said he had no personal knowledge

of whether she made it before or after he showed her Exhibit "O", and that the shoulders in the sketch bear a likeness to him (obviously a likeness to the shoulders in Exhibit "O", the photograph).

Petitioner contends the sketch was not relevant to any fact issue and was inadmissible. She said the man she saw in the courtroom, the appellant, was the man she saw at her son's house on the date of the crime. She did not testify that the man had on a shirt with a darker area at the shoulders. Therefore, the appearance of the shirt was not of any consequence in determining the innocence or guilt of the petitioner. The only purpose in introducing the sketch was to shore up the shakey process by which Mrs. Johnson ultimately identified the appellant.

We submit that the identification procedure in this case, viewed as a whole, was impermissibly suggestive, and resulted in unreliable identification which violated the Petitioner's due process rights.

CONCLUSION

For the reasons submitted, it is respectfully urged that this Court should issue its Writ of Certiorari to the Supreme Court of Arkansas, and reverse the conviction of the Petitioner and remand for a new trial.

Respectfully submitted,

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Appendix

APPENDIX "A"

SUPREME COURT OF ARKANSAS

No. CR 80-92

Opinion Delivered February 2, 1981

MARION ODELL MORROW ..... *Appellant*

VS.

STATE OF ARKANSAS ..... *Appellee*

APPEAL FROM WASHINGTON CIRCUIT COURT, FIRST DIVISION, MAHLON GIBSON, JUDGE

AFFIRMED

FRANK HOLT, *Associate Justice*

Appellant was convicted of burglary (Ark. Stat. Ann. §41-2002 [1] [Repl. 1977]), theft of property (Ark. Stat. Ann. §41-2203 [2] [b] [Repl. 1977]) and sentenced as a habitual criminal (Ark. Stat. Ann. §41-1001 [Repl. 1977]) to ten years and five years, respectively, the sentences to run concurrently as recommended by the jury.

Appellant first contends there was insufficient evidence of the current market value of the stolen items, which consisted of a television and a muzzle-loading rifle in a buckskin scabbard. The owner testified that he had purchased the television set for $442.85 at Sears about two years previous to the theft. He produced the receipt. His wife testified she had paid $23 for the gun case the previous summer. There was no evidence of the value of the rifle

nor the condition of any of the items at the time of the theft. Appellant overlooks the fact, however, that he testified on cross-examination that, in explanation of his possession of the items, he paid another person $115 for them. In the circumstances, the evidence is amply substantial that the property was in excess of the statutory requirement of $100. *Tillman v. State*, 271 Ark. ——, —— SW2d —— (December 22, 1980); *Bailey v. State*, 266 Ark. 260, 583 SW2d 62 (1979); and *Boone v. State*, 264 Ark. 169, 568 SW2d 229 (1978).

We next consider appellant's assertion that error occurred in the admission into evidence of a sketch made of the man by a witness who observed him taking the items from the victims' home. The sketch reflected how tall she thought the burglar was, the thickness of his hair and the lines on his shoulder garment. She thought he might have been wearing a "two-tone shirt or something." A photograph of appellant, introduced into evidence and taken shortly after his arrest, showed appellant wearing a similar shirt. Appellant argues that the sketch was not relevant to any fact issue and, therefore, inadmissible under Ark. Stat. Ann. §28-1001, Rules 401 and 402 (Repl. 1979).

Relevant evidence is that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *McGuire v. State*, 265 Ark. 621, 580 SW2d 198 (1979); and Rule 401, *supra*. In our view the sketch certainly tends to make it more probable than less probable that appellant was properly identified as having committed the alleged offense.

We now consider appellant's contention that prejudicial error was committed during the sentencing phase of

the trial when appellant's attorney and the prosecutor were permitted to stipulate to the existence of seven prior convictions without appellant being questioned as to whether he understood and agreed to the stipulation. The record shows the stipulation was made in a discussion at the bench. Although appellant's counsel stated to the court that he had consulted with the defendant, who agreed to the stipulation, no inquiry was made of the appellant by the court as to his acquiescence or that he understood the previous convictions could be used to enhance his sentence. Appellant cites *Cox v. Hutto,* 589 F.2d 394 (8th Cir. 1979) (Cox I), which holds that such a stipulation is a denial of due process of law, because it amounts to a waiver of a defendant's constitutional right to have the state prove the prior offenses and his right to rebut that proof under Ark. Stat. Ann. §43-2330.1(2) (Repl. 1977) and Ark. Stat. Ann. §41-1005(2) (Repl. 1977); such a stipulation is the equivalent of a guilty plea and, therefore, the trial court is required to question a defendant to determine if he knowingly and voluntarily agreed to the stipulation; and it is "constitutional error" not to do so. See also *Cox v. Hutto,* 619 F.2d 731 (8th Cir. 1980) (Cox II); and *McConahay v. State,* 257 Ark. 328, 516 SW2d 887 (1975).

Thus, the question is whether or not the asserted error mandates reversal of this case; that is, whether the verdict at sentencing can be supported by valid convictions, authenticated copies of which were presented to the jury, and whether we can say appellant did not suffer prejudice. See *Cox v. Hutto, supra* (Cox II). Here, three of the seven convictions did not show that appellant had the benefit of counsel or made a valid waiver. Therefore, these convictions admittedly cannot be used to support the enhanced

sentence. *McConahay v. State, supra.* This leaves four prior convictions which could support the sentences, argues the state, since the jury found two or three prior convictions. Appellant argues that it cannot affirmatively be said without speculation that the stipulation did not affect the jury's deliberation and that the stipulation denied him the opportunity to challenge, before the jury, the use of the prior convictions, which runs afoul of *Cox v. Hutto, supra* (Cox II).

However, in our view, the *Cox* cases are not controlling in the case at bar. There, four previous convictions were stipulated and read to the jury; it found him guilty of four previous convictions which subjected him to a maximum sentence enhancement of 31½ years and the jury so imposed. Here, the seven prior sentences were stipulated, introduced as evidence and given to the jury which found appellant guilty of only two or three of the seven stipulated prior felonies. It imposed only ten of a possible thirty years for burglary and five of a possible fifteen years for theft of property under our enhancement statute. The record shows appellant had an attorney in three of the seven stipulated convictions and waived assistance of counsel in another. Furthermore, appellant, during cross-examination by the prosecutor, had admitted to the jury two previous convictions and did not deny a third.

In the circumstances, we are of the view that the jury's verdict, absent the stipulation, is supported by sufficient valid convictions, and the state adequately met its required burden of showing appellant suffered no prejudice as a result of this stipulation.

Affirmed.

Purtle, J., dissents.

Dissenting Opinion of JOHN I. PURTLE, Associate Justice

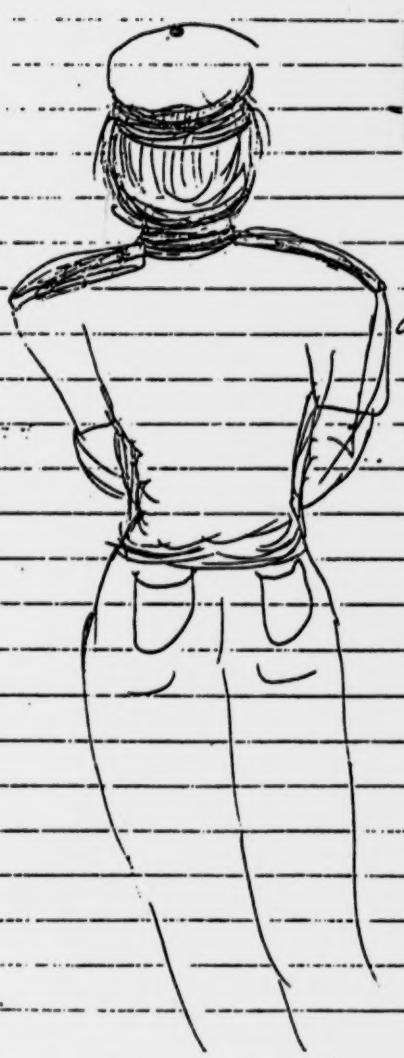
I respectfully dissent from the majority opinion in holding that the stipulation of seven convictions was properly presented to the jury. We do not allow a stipulation by an accused that he is guilty. We require proof to the court that the person is guilty and that he fully understands the rights he is giving up in pleading guilty. As was held in *Cox v. Hutto,* 589 F.2d 394 (8th Cir. 1979), the stipulation of prior convictions was the functional equivalent of a guilty plea. Therefore, it reasons that we cannot accept such stipulation without further proof and without the knowledgeable consent of the appellant.

It is obvious that the jury was concerned about the stipulation of the seven felonies by inquiring of the court whether such stipulation automatically set the number of convictions at four or more. I think the jury was entitled to know more about these convictions; of course, at least three of them could not have been presented to the jury had there been required of the state the proper degree of proof. The number of prior convictions is a factual determination to be made by the jury. Although we have previously reduced the sentence to the minimum allowed for the conviction, such would be improper in this case. *Klimas v. State,* 271 Ark. —— (December 22, 1980). The state has the same burden of proof in the matter of prior convictions as it does on the case in chief. *McConahay v. State,* 257 Ark. 328, 516 SW2d 887 (1974); and *Leggins v. State,* 267 Ark. —— (December 3, 1979).

There is no way that I know of by which it can be determined how much reliance the jury placed on the stipulation in reaching the sentences imposed. Obviously,

they gave more than the minimum and they did find the appellant had committed two or more previous offenses. Although I seriously doubt the appellant will fare as well on a retrial, I am of the opinion he has the right to a retrial because the stipulation on the seven prior convictions was prejudicial.

APPENDIX "B"



5'10" or 11"
about 160 lbs
Black hair
Thick hair

over

APPENDIX "C"

ABSTRACT OF JUDGMENTS

I Ronald D. Dobbs, hereby certify that the attached are copies of the original penal institution records of Marion Odell Morrow, ADC No. 58429.

Dated: May 21, 1979.

Signed: Ronald D. Dobbs, Warden. (T. 409)

PENITENTIARY COMMITMENT
STATE'S EXHIBIT 1-A
(T. 413)

Marion Odell Morrow was indicted for burglary and grand larceny in the Crawford Circuit Court. On March 17, 1970, Marion Odell Morrow, appearing without counsel entered a plea of guilty as charged and the court set his punishment at five years for burglary and one year for grand larceny with the sentences to run concurrently.

Signed: Glen Wisely, Circuit Court Clerk.

Dated: March 17, 1970.

PENITENTIARY COMMITMENT
STATE'S EXHIBIT 1-B
(T. 414)

Marion Odell Morrow was indicted for escape in Pulaski Circuit Court. Marion Odell Morrow, appearing with his appointed attorney, L. W. Rosteck, entered a plea of guilty to the escape charge on July 6, 1970, and was sentenced to one year in prison.

Signed: Roger McNair, Circuit Court Clerk.

Dated: July 6, 1970.

PENITENTIARY COMMITMENT
STATE'S EXHIBIT 1-C
(T. 415)

Marion Odell Morrow was indicted for burglary in Crawford Circuit Court. On February 23, 1967, through his attorney Lonnie Batchelor, Mr. Morrow entered a plea of guilty and his punishment was set at five years in the penitentiary with three years suspended.

Signed: Glen Wisley, Circuit Court Clerk.

Dated: February 23, 1967.

PENITENTIARY COMMITMENT
STATE'S EXHIBIT 1-D
(T. 416)

Marion Odell Morrow was charged by information with escape in the Jefferson County Circuit Court. On July 13, 1967, Mr. Morrow, without counsel, entered a plea of guilty to a charge of escape and his punishment was set at three years in the state penitentiary, his time to commence when the parole board determines that he is entitled to parole on No. 35823. This charge is No. 35601.

Signed: O. W. "Pete" Long, Circuit Court Clerk.

Dated: July 13, 1967.

PENITENTIARY COMMITMENT
STATE'S EXHIBIT 1-E
(T. 417)

Marion Odell Morrow was charged by information with escape in the Jefferson County Circuit Court. Mr. Morrow, appearing without counsel, entered a plea of guilty as

charged and the court assessed his punishment at two years in the state penitentiary, his time to commence when the parole board determines he is entitled to parole on prior sentence. This was charge No. 35823.

Signed: O. W. "Pete" Long, Circuit Court Clerk.

Dated: July 13, 1967.

JUDGMENT AND COMMITMENT
STATE'S EXHIBIT 2
(T. 419)

Marion Odell Morrow was charged in United States District Court, Northern District of Oklahoma, with violating 18, U.S.C., Sec. 2312, in that he transported in interstate commerce from Tulsa, Oklahoma to Fort Smith, Arkansas, a stolen 1955 Chevrolet. Mr. Morrow, appearing with attorney Robert G. Brown, entered a plea of guilty and was sentenced to five years in prison.

Signed: Allen E. Barrow, United States District Judge.

Dated: November 19, 1974.

EXEMPLIFICATION CERTIFICATE
STATE'S EXHIBIT 3
(T. 420)

I, Pat L. Graham, Jr., Clerk of the United States District Court for the Western District of Arkansas, hereby certify that the documents attached hereto are true copies of the judgment and commitment entered September 3, 1965, in criminal number 6081, Fort Smith Division, entitled United States of America v. Marion Odell Morrow.

Signed: Pat L. Graham, Jr., Clerk.

Dated: May 17, 1979.

JUDGMENT AND COMMITMENT

Marion Odell Morrow, appearing without counsel, appeared before United States District Judge John E. Miller, waived the right to assistance of counsel, entered a plea of guilty to a charge of violation 18 U.S.C., Sec. 2312, in that he transported in interstate commerce from Oklahoma City, Oklahoma to a point near Prairie Grove, Arkansas, a stolen 1955 Oldsmobile. Mr. Morrow entered a plea of guilty on September 3, 1965, and was sentenced to imprisonment for a period of 18 months.

Signed: John E. Miller, United States District Judge.

Dated: September 3, 1965.

THE COURT:

We, of course — they will be given to the jury for their consideration. Do you want me to give your stipulation to the jury?

MR. HEUER:

I would like to present them to the jury.

THE COURT:

Present stipulation, as it has been made to the court, and stipulate that it has been certified. They are certified copies of records reflecting seven previous felony convictions, and what the convictions are if you want to go into that.

MR. HEUER:

Thank you, Judge.

THE COURT:

Is that agreeable, Mr. Jones?

MR. JONES:

Yes, Your Honor.

(Above statements made at the bench, outside the hearing of the jurors.)

APPENDIX "D"

PORTION OF TRANSCRIPT

THE COURT:

Ladies and gentlemen of the jury, have you reached a verdict?

DAVID ROSE (The Foreman):

No, sir, we haven't.

THE COURT:

How do you stand as to numbers, and numbers only?

DAVID ROSE:

We have five (5), five (5) and two (2) undecided.

THE COURT:

You have been out about an hour and forty minutes. Do you seem to be making progress?

DAVID ROSE:

No, sir.

THE COURT:

Do you think there's a possibility you can make any progress? Do you want to back off and take another look?

DAVID ROSE:

I don't think so. (Several jurors shake (T. 443) their heads negatively.)

THE COURT:

I have got twenty minutes after three. Go back and try

another fifteen minutes. I will call you in and we will see where we are.

(The jury retires again to deliberate. As they leave the courtroom the following comments are made.)

A JUROR:

Can it be a simple majority?

THE COURT:

No, it must be unanimous.

DAVID ROSE:

Your Honor, can you tell us if he it still on parole?

THE COURT:

I can't tell you.

DAVID ROSE:

You can't?

THE COURT:

I cannot comment.

(The jurors retire once again and after deliberation, are called back into the courtroom.)

THE COURT:

Ladies and gentlemen of the jury, have you been able to reach a verdict?

DAVID ROSE:

We have not, Your Honor.

THE COURT:

How are you divided as to numbers only now? (T. 444)

DAVID ROSE:

Nine (9) and three (3).

THE COURT:

Do you think you are making any progress?

DAVID ROSE:

Right. Well, three (3) people who were very firm in their feelings to start with have not changed.

THE COURT:

Now, you twelve (12) people have been in the jury room, deliberating and, of course, I have not. Do you feel that you are making any progress? Is there any hope of reaching a verdict in this case?

A JUROR:

Can just any one of us answer?

THE COURT:

Yes. I don't want it as to how any individual feels about it, but do you feel there's any possibility of reaching a unanimous verdict?

A JUROR:

No, I don't because I think people are going to have to vote against their conscience, and we've got two (2) different groups and honestly don't think we can. I think we went as far as we could go.

THE COURT:

How do some of the rest of you feel?

JANITA MOORE (A Juror):

I agree. (T. 445)

THE COURT:

How —. Well, someone is going to have to make a determination in this matter, and I feel that you all are better qualified and as intelligent people as any will ever be. If you think there's any possibility at all in reaching a verdict, I would like for you to deliberate. If you think it is just absolutely impossible, well, that is a matter I will take into consideration. How do you feel about it? Mr. Foreman, let me ask you this: Do you feel it is possible for the jury to reach a verdict as to the level? In other words, one felony or two or three felonies, four felonies? If you can't reach a verdict on the punishment, are you able to agree on the level?

DAVID ROSE:

Yes, we are.

THE COURT:

I take it you have reached that agreement already?

DAVID ROSE:

Yes.

THE COURT:

I have five minutes after four. I don't want to belabor the point unnecessarily. I am going to send you back with this admonition — if at all possible, if you think it is possible, try (T. 446) to reach a verdict. If you simply cannot, and if it becomes just physically and mentally impossible that you cannot agree on punishment and if you can agree

on the level, agree on that and we will — return it back to the Court.

DAVID ROSE:

We have a level, Your Honor, we do.

WILLIAM LAMKINS:

May I ask a question? The fact that the seven (7) felonies were stipulated by both the prosecution and defendant does that automatically set it on four (4) or more?

THE COURT:

I can't directly comment on that. I simply can only point out that you heard the evidence, you heard the stipulation. I'll just have to leave it at that, but I am going to send you back to the jury room. If you think you can agree on it in total, do that. If you are unable to agree, agree on the level and sign the verdict on that basis. Return it to the Court. I'll give you another fifteen minutes and I'll call you back again.

A JUROR:

By "level" do you mean the number of counts of felonies? (T. 447)

THE COURT:

Yes. If you can reach that — if you can do the entire thing, that would be better but I don't want to put you in a hopeless situation.

WILLIAM LAMKINS:

Let me ask one more question. The level we are talking about are the previous convictions, the seven (7) felonies, stipulated?

THE COURT:

In your verdict there are three (3) possible levels. If you found only one (1) prior felony, or two (2) or three (3), or four (4) or more.

WILLIAM LAMKINS:

We are not bound by the stipulation that there are seven (7) previous felonies?

THE COURT:

That I cannot comment on. Do you think you can agree on that? All right, I'm going to send you back. I'll call you back at twenty after four unless you signal me earlier. Any objections, gentlemen? Mr. Jones?

(Mr. Jones shakes his head negatively.)

THE COURT:

Mr. Heuer, you've no objections or additions?

MR. HEUER:

No, Your Honor.

THE COURT:

You've no objections, Mr. Jones? (T. 448)

MR. JONES:

Pardon?

THE COURT:

You've no objections to my instructions to the jury at this point?

MR. JONES:

No, Your Honor.

(Upon call of the Court, the jurors return to the courtroom.)

THE COURT:

Ladies and gentlemen of the jury, have you been able to reach a verdict?

DAVID ROSE:

We have, Your Honor.

THE COURT:

Would you hand them to me, please? Is this your verdict as to Burglary — "We, the jury, find defendant Marion Odell Morrow has been found guilty of either two or three previous felonies and fix his sentence at a term in the Arkansas Department of Correction of 10 years", and signed David C. Rose, Foreman? Is that your verdict? Is that a unanimous verdict?

DAVID ROSE:

Yes, it was.

THE COURT:

All right. Is this your verdict — "We, the jury, find Marion Odell Morrow has been convicted or found guilty of either two or three previous (T. 449) felonies and fix his sentence at a term of 5 years in the Arkansas Department of Correction, signed David C. Rose, Foreman". Is that your verdict, Mr. Rose?

DAVID C. ROSE:

Yes.

THE COURT:

Is that unanimous?

DAVID C. ROSE:

Yes.

THE COURT:

Do you want the jury polled?

MR. JONES:

No, Your Honor.

THE COURT:

Ladies and gentlemen, thank you very much.

WILLIAM LAMKINS:

I didn't hear anything about running concurrent.

THE COURT:

Oh, it is recommended by the jury that the sentences run concurrent. This is something I will consider. I am not bound by it but I will take it into consideration in imposing sentence. You are excused. (T. 450)

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NO. 80-1672

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

MARION ODELL MORROW — *PETITIONER*

VS.

STATE OF ARKANSAS — *RESPONDENT*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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50 Copies — June 26, 1981

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TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTIONS PRESENTED FOR REVIEW

1. Whether Defendant's due process rights were violated when defense counsel, in a Habitual Criminal trial, stipulated that Defendant had seven prior felony convictions, thus depriving the Defendant of any opportunity to challenge the use of these prior convictions in determining his sentence.

II. Whether the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

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OPINION BELOW

The opinion of the Supreme Court of Arkansas affirming the conviction of petitioner is reported at *Morrow v. State*, 271 Ark. (February 2, 1981), 610 S.W.2d 878. This opinion is filed as petitioner's Appendix A.

JURISDICTION

Respondent concedes that this Court has jurisdiction to review this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner failed to include the relevant provisions of the United States Constitution.

AMENDMENT 5

> **(Criminal actions—Provisions concerning—Due process of law and just compensation clauses.)**—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14

§1. **(Citizenship—Due process of law—Equal protection.)**—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes cited by the respondent are:

41-901. Sentence to imprisonment — (1) A defendant convicted of a felony may be sentenced to a term of imprisonment:

(a) not less than five (5) years nor more than fifty (50) years, or life, if the conviction is of a class A felony;

(b) not less than three (3) years nor more than twenty (20) years, if the conviction is of a class B felony;

(c) not less than two (2) years nor more than ten (10) years, if the conviction is of a class C felony;

(d) not exceeding five (5) years, if the conviction is of a class D felony;

(e) in accordance with the limitations of the statute defining the felony, if the conviction is

of an unclassified felony.

41-1001. Sentence to imprisonment for felony—Extended term for habitual offender.—(1) A defendant who is convicted of a felony and who has previously been convicted of more than one (1) but less than four (4) felonies, or who has been found guilty of more than one (1) but less than four (4) felonies, may be sentenced to an extended term of imprisonment as follows:

(a) not less than ten (10) years nor more than fifty (50) years, or life, if the conviction is of a class A felony;

(b) not less than five (5) years, nor more than thirty (30) years, if the conviction is of a class B felony;

(c) not less than three (3) years nor more than fifteen (15) years, if the conviction is of a class C felony;

(d) not exceeding seven (7) years, if the conviction is of a class D felony;

(e) upon conviction of an unclassified felony punishable by less than life imprisonment, not less than three (3) years more than the minimum sentence for the unclassified offense nor more than five (5) years more than the maximum sentence for the unclassified offense;

(f) upon conviction of an unclassified felony punishable by life imprisonment, not less than ten (10) years nor more than fifty (50) years, or life.

> (2) A defendant who is convicted of a felony and who has previously been convicted of four (4) or more felonies, or who has been found guilty of four (4) or more felonies, may be sentenced to an extended term of imprisonment as follows:
>
> (a) not less than fifty (50) years nor more than life, if the conviction is of a class A felony;
>
> (b) not less than twenty (20) years nor more than forty (40) years, if the conviction is of a class B felony;
>
> (c) not less than ten (10) years nor more than twenty (20) years, if the conviction is of a class C felony;

Relevant statutes which the petitioner failed to include are:

> **43-2330. Prima facie evidence of former conviction.** — The duly certified copy of the record of a former conviction and judgment of any court of record for imprisonment in the penitentiary against the person indicated or the certificate of the warden or other chief officer of any pentitentiary of this State or any other State in the United States, or the Federal Government or of any foreign country, or of the chief custodian of the records of the United States Department of Justice, containing the name and the fingerprints of the person imprisoned as they appear in the records of his office shall be prima facie evidence on the trial of any person for a se-

cond and subsequent offense, of the conviction and judgment of imprisonment in the penitentiary and may be used in evidence against such person. (Acts 1953, No. 228, § 3, p. 692; 1961, No. 95, § 1,p. 220.).

43-2330.1 Trial procedure for habitual criminals — The following trial procedure shall be adhered to in cases involving habitual criminals:

(1) The jury shall first hear all of the evidence pertaining to the current charge against the defendant and shall retire to reach its verdict, as to this charge, based only upon such evidence; provided, however, that nothing herein shall prohibit cross-examination of a defendant as to previous convictions when the defendant takes the stand in his own defense.

(2) If the defendant is found guilty, the same jury shall sit again and hear evidence of defendant's prior conviction(s). Provided, that the defendant shall have the right to deny the existence of any prior conviction(s), and to offer evidence in support thereof.

(3) The jury shall again retire, and if it is found that the prior conviction(s) exists, or if the defendant admits such previous conviction(s), then the prior conviction(s) shall be considered in fixing the punishment for the current offense for which the defendant has been convicted in accordance with Section 1(§43-2328) hereof. (Acts 1967, No. 639, §2,p. 1174.)

STATEMENT OF THE CASE

Although self-serving, petitioner's statement of the case is adequate to apprise the Court of the context in which the issues are presented.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED IN AN HABITUAL CRIMINAL TRIAL WHERE DEFENSE COUNSEL STIPULATED TO THE AUTHENTICITY OF THE STATE'S PROOF OF SEVEN PRIOR FELONY CONVICTIONS AND THE JURY FOUND THAT THE PETITIONER HAD BEEN FOUND GUILTY OF ONLY TWO OR THREE PRIOR FELONIES.

At trial, petitioner's counsel stipulated to the authenticity of State's Exhibit 1A-E, State's Exhibit 2, and State's Exhibit 3 which were certified copies of judgments of record of various state and federal courts. (See Petitioner's Appendix C.) They reflected that petitioner had a total of seven prior felony convictions, although three of the seven judgments failed to show whether the petitioner had been represented by counsel or had waived such right. (State's Exhibit 1A, D and E.) At a bench conference, defense counsel stated:

> I have consulted with the defendant; he has agreed to let those in. He has examined these documents and has agreed to the stipulation. (T. 408)

Following the introduction of these documents, the State rested and the trial court gave the defense an opportunity to present evidence (See Appendix A.) Petitioner's mother and girlfriend testified to his reformation. (T. 425-429) The trial court then properly instructed the jury on the sentencing phase of the habitual criminal trial and gave them verdict forms for the two charges of burglary and theft of pro-

perty. (See Appendix A.) These forms listed three alternative findings: (1) that the defendant had been found guilty of one previous felony (2) that the defendant had been found guilty of two or three previous felonies or (3) that the defendant had been found guilty of four or more previous felonies. The jury deliberated for some time before finding that the petitioner had been convicted of two or three prior felonies and sentenced him to ten years on the burglary charge and five years on the theft charge.

Petitioner now contends that his due process rights were violated by this stipulation in that he was deprived of any opportunity to challenge the use of these prior convictions in determining his sentence. Petitioner relies on *Cox v. Hutto*, 589 F.2d 394 (8th Cir. 1979), hereinafter cited as Cox I and *Cox v. Hutto*, 619 F.2d 731 (8th Cir. 1980), hereinafter cited as Cox II.

In Cox I, defense counsel stipulated to four prior felony convictions which was the *only evidence* of those convictions entered at the state court trial. The jury sentenced the defendant to the maximum amount of time allowable under the then applicable habitual offender statute. The Eighth Circuit Court of Appeals held that this stipulation was the functional equivalent of a guilty plea and thus, deprived the defendant of due process as the trial court had not determined whether he knowingly and voluntarily agreed to the stipulation. Prejudice would be presumed, absent sufficient proof by the State, aside from the stipulation, of the prior convictions necessary to support the sentence.

On remand in Cox I, the district court found the State's proof ambiguous as to the prior convictions. That court concluded that Cox had suffered prejudice as the improper stipulation had deprived him of a jury determination of his status as an habitual criminal. In affirming the district

court, the Court of Appeals stated in Cox II:§

> The error could be harmless only if evidence properly before the jury overwhelmingly established the fact of sufficient prior convictions to support the habitual criminal finding and if beyond a reasonable doubt the error did not affect the jury's determination.

619 F.2d at 736.

There is no question that the present case is distinguishable from Cox I and II. Aside from the stipulation and the constitutionally infirm judgments, there was sufficient evidence of four valid convictions before the jury which nevertheless, determined that appellant had been convicted of only two or three prior convictions. The actual sentences received were not only in the lower range of possible punishment as a habitual offender, but were in the lower range had there been no habitual charge at all. Petitioner's due process rights were not violated and even if they had been, which the State by no means concedes, it is difficult to see how any prejudice would arise from this jury's determination and sentence.

Though the trial court did not question the petitioner personally in the case at bar, defense counsel did state that he had been consulted and had examined the documents. These documents were then given to the jury which took them with them when they retired to deliberate. Evidence had also been presented to the jury by the defense. It should also be noted that during the guilt phase of the trial, petitioner had admitted on cross examination to three prior convictions. (T. 306)307) All of these factors were missing in Cox.

Also contrary to *Cox*, the petitioner here was not prevented from having the jury determine his status as an habitual criminal. Here, despite documentary evidence of seven prior felony convictions, the jury found petitioner guilty of only two or three prior felonies. Clearly the jury deliberated and made its own determination as to the number of prior felonies despite the State's exhibits and the defense stipulation.

Another distinguishing factor from Cox is that the jury did not sentence the appellant to the maximum sentence which could be had for an habitual criminal convicted of two or three prior offenses. The sentence ranges for the three alternatives presented to the jury were:

CLASS B FELONY - BURGLARY CHARGE

One or less prior convictions	3-20 years
Two or three prior convictions	5-30 years
Four or more prior convictions	20-40 years

CLASS C FELONY - THEFT CHARGE

One or less prior convictions	2-10 years
Two or three prior convictions	3-15 years
Four or more prior convictions	10-20 years

Ark. Stat. Ann. §41-901 and 1001 (Repl. 1977).

Petitioner received only ten years on the burglary charge and five years on the theft charge.

Evidence of three of the seven prior convictions did not reflect that the petitioner was represented by counsel or that he had made a valid waiver of his right to such. These three convictions could not properly be considered for enhancement purposes, *Klimas v. State*, 259 Ark. 301, 534 S.W.2d 202 (1976), *cert. denied*, 429 U.S. 846 (1976); *Burgett v. Texas*, 389 U.S. 109 (1967), but that does not mean that the sentence is defective. In *Gerberding v. Swenson*, 435 F.2d 368 (8th Cir., 1970) *cert. denied* 403 U.S. 906,

91 S.Ct. 2211, 29 L.Ed.2d 682 (1971), the use of a constitutionally infirm conviction where there was plenty of remaining support for the sentence as an habitual offender was found to be harmless.

In short, the record here shows that the State submitted to the jury evidence of four valid prior convictions. The jury making its own determination found that the petitioner had two or three prior convictions and imposed sentences within the lower permissible range. Respondent submits that petitioner's writ of certiorari should be denied as in the concluding words of the opinion by the Supreme Court of Arkansas in this case:

> In the circumstances we are of the view that the jury's verdict, absent the stipulation is supported by sufficient valid convictions and the state adequately met its required burden of showing appellant suffered no prejudice as a result of this stipulation. (Petitioner's Appendix A at A-4.)

II. PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE IDENTIFICATION PROCEDURE USED IN THIS CASE.

Petitioner puts forth for the first time in this petition that his due process rights were violated by unnecessarily suggestive pretrial confrontation procedures. This issue was not considered by the Supreme Court of Arkansas as the petitioner on appeal there only challenged the admission into evidence of a sketch drawn by an eyewitness to the crime, Mrs. Grace Johnson.

The due process clauses of the Fifth and Fourteenth

Amendments to the United States Constitution preclude admission of evidence that derives from an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall v. Denno*, 388 U.S. 293 (1967). However, it is the substantial likelihood of misidentification which is violative of a defendant's due process right. *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977); *Neil v. Biggers*, 409 U.S. 188 (1973).

The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the defendant at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Neil v. Biggers, supra*, at 199.

Mrs. Johnson lived across the road from her son's home. (See Appendix B for abstract of testimony.) She was alerted by her barking dog shortly after noon on the day of the crime that something was amiss. (T. 131-132) She saw a red car in her son's driveway. She partly walked and ran across the road and saw a man carrying her son's television set from inside. (T. 132-134) The man then got some fishing poles and a gun before he saw her. He dropped the poles threw the gun into the backseat of his car and began to back out of the driveway. (T. 134) Mrs. Johnson testified that she had a full frontal view of the man from 100 feet moving as close as 20 feet and said that by the time he was backing his car out of the driveway, she was within 4 to 6 feet of him. (T. 134, 135, 145, 158)

She immediately called the police and gave them a

description of the man and his car including the license number and the direction he was traveling. (T. 206-207) He was described as being a white male, wearing a green "bell" cap, a red pullover shirt and probably Levi's, and had dark thick shoulder length hair. (T. 135, 141, 142, 145) Within minutes, Chief of Police Gene Philpot and Officer Andy Morton stopped a car fitting Mrs. Johnson's description including the license number. (t. 216-217) Philpot and Morton testified that there was a television in the front seat and a gun in the back seat. (T. 217, 220, 229) Morton testified that the petitioner was wearing a red pullover shirt and blue-jeans and that there was a green cap in the front seat. (T. 230-231)

Mrs. Johnson positively identified the petitioner at trial as being the burglar and thief. (T. 146) Philpot and Morton identified him as the man they had arrested. (T. 218, 228) Mrs. Johnson had been shown photographs of the petitioner three times prior to trial, but could not positively identify him from the photographs. (T. 145) Petitioner was arrested on May 11, 1979 and tried on August 27, 1979. Several days after the crime, Mrs. Johnson was shown a group of pictures including one of the appellant which was taken at his arrest. (T. 148, 334) Three weeks later she was shown some black and white photographs by an investigator hired by the petitioner. (T. 148, 166-168) The third occasion was on the Friday prior to trial when the prosecutor showed her photographs of the appellant. (T. 150) He told her then if she could not identify the appellant in court, he wanted her just to tell the truth. (T. 166)

Clearly the likelihood of a misidentification in these circumstances was remote. The identification procedures were not unnecessarily suggestive. The witness had ample opportunity to view the suspect. The arrest was made very quick-

ly on an accurate description. The eyewitness did not positively identify the petitioner from photographs, but did positively identify him in court some three and a half months later.

Mrs. Johnson was a very conscientious witness to whom the truth was very important. (T. 164) During the meeting with petitioner's investigator, she kept notes. (T. 149, 150, 168, 169) She had made notes on this crime at other times as well and had made sketches of the burglar. (T. 172) One of these sketches was introduced into evidence as State's Exhibit J. (See Petitioner's Appendix B.) State's Exhibit O was a photograph of the petitioner taken upon his arrest. There is a remarkable similarity between the shoulders of the shirt in the sketch and that of the photograph. It is in this context that the issue of suggestibility arose.

Mrs. Johnson positively stated that the sketch was made before the investigator showed her any pictures and she thought it was made before Rexford showed her any pictures. (T. 173) None of Rexford's pictures were of a rear view of a man. Rexford testified that the photographs were "bust-type" photos of seven different poeple and that he had tried to make the photos as close as possible to the appellant in build, hair style and type of clothing. (T. 254) He stated that Mrs. Johnson was unable to pick out the appellant from these photos. (T. 254) It is difficult to conceive that one of seven "bust-type" photographs which the witness did not identify as the petitioner was so suggestive that it created a "substantial likelihood of misidentification" from this rearview sketch. Though the witness only "thought" she drew the sketch before viewing this photograph, the possibility that she drew it after would not render the witness' identification of the petitioner at trial to be the result of an impermissable suggestion. There was not

a substantial likelihood of misidentification as a result of this sketch and thus, petitioner was not denied his due process rights.

CONCLUSION

Wherefore, for each of the above reasons and for the authority cited in support thereof, respondent prays that this Court will deny the petition for writ of certiorari.

Respectfully submitted,
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Attorney General

By: Leslie M. Powell

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CERTIFICATE OF SERVICE

I, Leslie M. Powell, Assistant Attorney General, do hereby certify that I have served petitioner by placing three copies of the above and foregoing pleading in the United States Mail, postage prepaid, addressed to Mr. Sam Hugh Park, 410 Fayetteville Street, Van Buren, Arkansas 72956, attorney of record for petitioner, this ____ day of June, 1981.

Leslie M. Powell
Leslie M. Powell.

APPENDIX
APPENDIX A

The following is the petitioner's abstract of testimony on appeal applicable to evidence received in the penalty phase.

MR. HEUER:

State would move simply at this time based upon the stipulations to enter the seven prior convictions and let the jury take these with them to deliberate. (T. 423)

THE COURT:

They are received and admitted without objection.

MR. HEUER:

State would rest at this time.

THE COURT:

All right, State rests. Do you have any evidence you wish to present?

MR. JONES:

Yes, Your Honor. Defense would call Velma Gray. (T. 424)

VELMA GRAY, a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION.

I am Velma Gray and I live at Cedarville, Arkansas, and the defendant is my son. He

has been involved over a period of years with the law. I lost my husband, he is all I got. I'm on nerve pills.

He has been out of jail about between two and three years. He has been working real steady. He works over at G. E. and has a good job and he has settled down a lot. He bought some property across the street from me and planned to build (T. 425) a new home on it. He has been married before and divorced. As to whether there is any reason I would hope and think that this jury should give him the benefit of a doubt, Odell took a lie detector test and he passed it. I sure do think that should make his sentence lighter. If the jury allowed him to continue his freedom I know he could stay out of trouble. Odell has got more going for him than he ever had. There is no way he would go out and mess up. This is the first time I have seen Odell happy. He and Linda are going to get married and this is the only time in his life he has ever had anything to live for. I see him every day. We live about 10 mi[illegible]part but I go that way and he comes by and you know we talk every day. (T. 426)

I just don't know but my honest opinion, Odell is not guilty. The first time in his life he has ever had anything to live for and he really had big plans to build a house and they's working steady. I just don't -- he passed the lie detector test. I just don't see -- it just don't make sense that he would get out and mess up. I just don't see it. (T. 427)

LINDA TITSWORTH, called as a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION

My name is Linda Titsworth and I live at Van Buren. I have known Odell Morrow since February of 1978. We met when I first started working at General Electric. The relationship has blossomed since then and we are planning to get married. We don't have a date set. When all of this came up we were talking about getting married and then when this was hanging over his head it was postponed. (T. 428) I do live with Odell and I have children of my own. We have a very good home life. My children think the world of Odell. My boy is 11 and my girl is eight and my girl does call him daddy although she sees her daddy every other weekend, she still is more attached to Odell than she is her own daddy.

I have noticed a change in Odell's behavior since the first time I met him. He doesn't drink near as much as he used to and he has settled down. He doesn't run around a lot or anything. We have a real good homelife together. (T. 429)

THE COURT:

Ladies and gentlemen, I will now give you my final instructions. (T. 430)

INSTRUCTIONS

THE COURT:

As I told you earlier, you have found Marion Odell Morrow guilty of the offense of Burglary and Theft of Property. Normally you would have been asked to fix his punishment at the time you determined his guilt or innocence of that charge. However, in this case, the State has also alleged that the defendant, Marion Odell Morrow, is subject to an extended term of imprisonment as an habitual offender.

A person is an habitual offender if he has been previously convicted of at least two other felonies. The State has the burden of proving the other felony convictions beyond a reasonable doubt.

NO. 2

Now if you find beyond a reasonable doubt that Marion Odell Morrow has been convicted of four or more previous felonies, you may sentence him to a term of imprisonment on Burglary in the Arkansas Department of Correction of not less than 20 years nor more than 40 years or by a fine not exceeding $15,000, or by both imprisonment and fine.

If you find beyond a reasonable doubt that Marion Odell Morrow has been convicted of either two or three previous felonies, you may sentence him to a term of imprisonment in the

Arkansas Department of Correction of not less than five years nor more than 30 years, or by a fine not exceeding $15,000, or by both imprisonment and a fine.

However, if you have a reasonable doubt that Marion Odell Morrow has previously been convicted of at least two other felonies you must disregard the habitual offender provisions but you may sentence him to a term of imprisonment in the Arkansas Department of Correction of not less than three years nor more than 20 years, or by a fine not exceeding $15,000, or by both imprisonment and a fine.

NO. 3

Now, as to the Theft of Property, if you find beyond a reasonable doubt that Marion Odell Morrow has been convicted of four or more previous felonies, you may sentence him to a term of imprisonment on Theft of Property in the Arkansas Department of Correction of not less than 10 years nor more than 20 years, or by a fine not exceeding $10,000, or by both imprisonment and fine.

If you find beyond a reasonable doubt that Marion Odell Morrow has previously been convicted of either two or three previous felonies, you may sentence him to a term of imprisonment in the Arkansas Department of Correction of not less than three years nor more than 15 years, or by a fine not exceeding $10,000, or by both imprisonment and a fine

However, if you have a reasonable doubt that Marion Odell Morrow has previously been convicted of at least two other felonies, you must disregard the habitual offender provisions, but you may sentence him to a term of imprisonment in the Arkansas Department of Correction of not less than two years nor more than 10 years, or by a fine not exceeding $10,000, or by both imprisonment and a fine.

NO. 4

Now, after hearing arguments of counsel, you will again retire to consider and complete two of the following verdict forms, one as it applies to Burglary, and one as it would apply to Theft of Property.,

All 12, of course, must agree on the verdict but only the foreman must sign, as in the initial finding of guilt or innocence.

(There were no objections to the instructions) (T. 434)

(ABSTRACTOR'S NOTE: Statements by the attorneys, page 434, 441, are ommitted.)

THE COURT:

All right, ladies and gentlemen, I am going to give you two (2) verdicts or forms, one is for the Burglary charge, one is for the Theft charge. On each form you will find three (3) possible alternatives; one being if you find the defendant convicted only of one previous felony; second alternative would be a form

you would use if you find that he had been convicted two or three times; and the third alternative would be a finding you would use if you found he had been convicted of four (4) or more felonies. In other words, you use only one of these. Once you have reached a verdict as to one charge, you have automatically excluded the other two (2). The same, of course, applies to the Theft charge. Once you have narrowed your decision down to which alternative to use, either four (4) or more prior convictions, two (2) or three (3) prior felony convictions, or not more than one (1) prior felony, then you complete the punishment which I think is self-explanatory within that. All right. You were the foreman, weren't you Mr. Rose? I will hand this to you. Retire and begin your deliberation. Everyone remain seated please until the jury has left the courtroom. Bailiff, would you take the jury? Do you want my final instructions to go with you?

A JUROR:

Yes.

(The jury retires to deliberate punishment.)

APPENDIX B

The following is the petitioner's abstract of testimony on appeal applicable to evidence received in the guilt phase. Grace Johnson, a witness for the State testified as follows:

> My name is Grace Johnson and I live with my husband, Buster Johnson, and my mother. My nearest neighbors are Larry Johnson and his wife, Patty. (T. 129) They are my son and daughter-in-law. They live just across a dirt road from us. The nearest highway to our house is Highway 45 and is about 300 feet from my house. If you turn east on that highway you would be going toward Prairie Grove and if you turned west you would be going toward Stilwell, Oklahoma.
>
> Yes, I recall May 11 of this year. (T. 130) I recall that day because that is when my son's house was robbed. I had been watching "Noon on Five" a news and weather program on television. I do have a dog which is half collie and half German shepard. Normally I keep him detained but on this particular day he was not. He is chained up now. On May 11 of this year the dog caused me to go outside because he was very upset. He barks at strange cars or noises and he was barking violently and ran up the road (T. 131) toward Larry's house. I walked out into the yard to see if I could see anyone. They had been building the house and I thought perhaps it was a repairman or something. The garage

door was down and I could see no one and I went back inside the house. I was working in the kitchen but I was listening and watching television. At that time "Noon on Five" had just gone off and "Days of Our Lives" had just come on. It comes on television at 12:30. After "Days of Our Lives" came on I went outside and was watering some houseplants or something on the porch. When I went back outside (T. 132) I noticed the garage door to my son's house was open and I wondered why and I walked out there where I could see and that is when I saw someone there. There was a red car there at the time. I saw a man just inside the garage door walking in towards the inside entrance. He did not appear to me to be a worker or anything like that. When I saw the man I ran back in the house for a jacket because it was cool. I was just in and out very quickly. When I got the jacket on I went directly to my son's home which is right across the street. (T. 133)

My son's house is not directly across the street from ours but is kind of catty-cornered. When I went over there there was a man carrying the television from inside. He came just out of the garage from the house entrance. I saw him come all the way across the garage and he took the television out and he put it in the car. Then he went back and picked up some fishing poles and gun. At this time I was walking toward him. He dropped the fishing poles but he kept the gun and put it in the back seat of the car. (T. 134) By the time he

put the gun in the car I was probably about 20 feet from him. Before I stopped I got to within four to six feet from the car. I saw the left side of his face through the car. The man then turned, looked out the rear window, and backed out. He never really payed any attention to me but I know he saw me. He had dark hair, shoulder length dark hair. When he started backing up the red car (T. 135)

* * *

I do not remember how many police officers I talked to on the phone today, two that I know of. I was quite nervous when I telephoned the police. I wasn't scared I was just upset. I do remember to talking to Police Chief Troy Keathley. I gave him a description of the man I saw. I told him that the man had on a bill cap and possible a pull-over shirt and possibly jeans but I wasn't just real sure. I do recall giving some clothing colors to Chief Keathley. (T. 141) I am sorry but I do not recall the colors now. It bothers me that I don't remember. My mind is just blank on the colors. What you have marked for identification as State's Exhibit G is a cap that is very definitely similar to the cap I saw.

Officer Keathley instructed me to stand by so that I did not make any telephone calls immediately. It was probably about five minutes before I made a call and I called my husband.

* * *

From the time I saw the man pull onto Highway 45 and the time I talked to the

police could not have been more than a minute.

It is correct that I have some problems remembering this person. I had never seen him before May 11 of this year. On that date I got to within four or five feet from him. I do recall describing his hair on that date and I said it was very dark, shoulder length hair. It was thick. It is correct that I have been shown photographs of this man on more than one occasion since May 11. I could not positively identify him from those photographs. (T. 145) I do see that man here today, sitting at the table with Mr. Jones. (She points to defendant) This is the second time that I have seen him, I know this is the man because I just know I saw him. Yes I recall the talk we had Friday afternoon when I told you the truth is more important to me than it is to the man that is on trial. (T. 146)

CROSS EXAMINATION

The hat that the prosecuting attorney showed me is similar to the one I saw on the man driving the Nova because he had on a hat made exactly like that. The shape, the make, the color. I think it was green but I am not – no it was not yellow, or orange, or brown. As to whether I am telling you the color was green, I am not positive on the color but the other colors you mentioned, I am positive it was not. (T. 147)

I have seen pictures of this man on three different occasions, I think. The first time I saw pictures they were brought by Charles Rexford. The pictures he showed me had a frontal view and a side view of this man. At the time I told him I could not be sure because I couldn't tell his size. On the second occasion that I was shown pictures a man by the name of Gordon Forrester brought them to my home. (T. 148) The picture that I particularly recall he was standing behind a car, a red Nova. Yes I do recall that the pictures I saw were in black and white rather than in color. I remember seeing a front view and I may have seen a side view, but I don't think I saw a rear view. When Mr. Foster asked me whether I could identify that man by the pictures, I told him that I wasn't completely sure but that I thought it was. (T. 149) I said that I believed that I thought it was the man. The third occasion that I saw pcitures of Odell Morrow was on Friday. There was just a front view I believe. The prosecuting attorney showed me those pictures at my house. He only showed me pictures of Odell Morrow. (T. 150)

* * *

He threw the fishing poles down and put the gun in the back seat of the car. (T. 157) He did not acknowledge my presence and I did not say anything to him. I did perceive at the time I saw him that he was robbing the house. The reason I did not say anything to him was because by the time I had gotten up there he

had gotten into his car and it was very obvious he wasn't waiting or talking to anyone, he was leaving. At one point I did get a full look at his face. The first time I got a full view of his face I was probably 100 feet from him. As I got closer to him I saw him again from the front as he was coming out of the house. As best I can remember (T. 158) the closest point where I saw him at full face view was probably 75 feet. I would estimate it is probably 20 feet from where I am sitting to the back of this courtroom. As he was backing out of the driveway I followed him out but he never turned back around and gave me another full face view. Besides the color of the car, which was red, I remember that it had "Nova" written on the front. It was solid color. Yes I was emotional and upset. (T. 159) I was not scared I was just nervous. As the man was backing out of the driveway he wasn't wasting any time but he wasn't in the greatest of hurry. When he hit the road he was moving on pretty fast. He did not spin his tires as he went out of Larry's driveway but as he hit the driveway, which is gravel, he did. On Highway 45 he turned west towards Stilwell. I saw him turn west. There are trees between my house and the highway but I was standing in the road. (T. 160)

* * *

As to whether I knew what this person looked like, by the pictures I couldn't tell, but when I seen him I sure again know him. The truth is very important to me because I am a

christian. (T. 164)

At the time I got finished talking to the first policeman it was probably 15 minutes until 1:00. I think the television set was still on at that time but I wasn't paying any attention. (T. 165)

REDIRECT EXAMINATION

It was right at 1:00 that I learned that a person had been apprehended. On Friday we did go over all of these pictures and the identification problems quite a long time. You told me that if I could not identify him today just to tell the truth. You did not tell me that you wanted me to point him out.

It is correct that Mr. Jones told me that Gordon Forrester took notes when he talked to me and would testify about that. (T. 166) But he did not take any notes while we were talking. I never did deny that the pictures that I saw of this person were the pictures of Mr. Morrow, sitting at the defense table. I never did say that "Mr. Foster, these pictures are not the man". I told him that I thought they probably were. When Mr. Rexford brought pictures out to me, he showed me a whole bunch of pictures all lined up. I could not pick the man out. The pictures were in black and white. I did make recordings of my conversation with Mr. Foster. What you have marked as State's Exhibit I is some notes that I wrote down after talking to Mr. (T. 167)

Foster. I wrote these down the day he was here because I was afraid I might forget.

Yes, a lot of pressure has been on me about remembering this man and I have been worried about testifying up here. What I wrote down was "June 1, 79, at 11:30 - a guy by the name of Gordon Forrester was here, private investigator with Jones, former Springdale policeman, asking questions about a robbery. Said two persons was involved. Showed me a picture of a guy who I think was the person who I – ". Yes I said I thought he was the person in my own notes. Mr. Forrester was there when I (T. 168) saw the pictures. My daughter-in-law was also there. It was just a few hours after Mr. Forrester left that I wrote this down. All the writings on this paper were done by me at the same setting. It is my handwriting. I wrote this after my interview with Mr. Forrester.

MR. HEUER:

State moves to introduce State's Exhibit I.

THE COURT:

Any objections, Mr. Jones?

MR. JONES:

Your Honor, there is some writing on the bottom of the document that I believe needs to be asked about. This, in the ball point pen. (T. 169) Is she testifying that is in her handwriting?

MR. HEUER:

I understand it to be all her writing, but let me ask.

A. It is.

BY MR. HEUER:

Q: The ball point pen writing?

A: It's mine.

Q: You did write this (pointing)?

A: Yes.

Q. Was it just an afterthought that you just dotted down?

A: Yes.

* * *

REDIRECT EXAMINATION

On this particular matter I did doodle quite a bit. On more than one occasion I sit down at my house and tried with a pencil and paper to remember what this fellow looked like on May 11. I took notes on the time of day, the type of car, the license number, sketches of what I thought he looked like. I do have one of these sketches here with me today. (T. 172) What you have marked a State's Exhibit J is a back view of a man an how tall I thought he was and about ho heavy and the thick, dark hair. Mr. Forrest had not talked to me before I made the doodles and I do not recall if Officer Ro-

had already talked with me before I made these drawings. I do not think Rexford showed me pictures before I made these drawings. No, none of the pictures that Rexford showed me would have been of a man standing with his back towards me and dressed with a cap. As to what that is that I drew on the shoulders, I was just trying to figure out the colors. Some how I thought he might have had on a red shirt and I put it there to see what it would look like. (T. 173)

TROY KEITHLEY, a witness for the State testified as follows:

Based on her voice, she was very excited and very nervous.

At first she was telling the dispatcher that there was an armed robbery. The dispatcher was new and he was pretty nervous himself. That was one reason I was listening in on the conversation. Finally when I saw that the two of them weren't making much headway I butted in on the phone and immediately the dispatcher hung up and I talked to Mrs. Johnson a couple of seconds and determined it was not a armed robbery, but that her son's house had been burglarized. She described the subject burglarizing the house as a white male wearing a green cap or hat, a red shirt. She thought he was wearing Levi's. She said she had walked up to the subject as he came out of the house, I believe, talked to him, asked him what he was doing and he didn't say anything and just got in the car and took off.

She described the car to me as a red Chevrolet Nova bearing Oklahoma license number WS-5757. She said the car was headed (T. 206) west toward Oklahoma. However, if you know Highway 45 it is going south – at times you are going west – she described "west toward Oklahoma". According to her it would not have been going back towards Fayetteville or Lincoln. It was approximately 12:45 when I received this phone call. I do have the police department log sheet. The time of the call is reported as 12:45.

I have seen what you have marked for identification as State's Exhibit G. I saw that hat in my police department at one time, I do not have actual knowledge as to who delivered it there. As to how long the hat stayed at my (T. 207) police department, I'm not sure of that. It went from my police department to deputy Charles Rexford of the sheriff's department. Basically the hat you are showing me is the same shape and size as the hat that was in my department.

GENE PHILPOT, called as a witness on behalf of the state, testified as follows:

DIRECT EXAMINATION

I am Gene Philpot, Chief of Police at Stilwell, Oklahoma. I have been from Stilwell to Prairie Grove, Arkansas but I do not know how many miles that is.

On May 11 of this year I was on duty and I received information about a particular Nova on that date. (T. 215) At sometime around 1:00 on May 11, the dispatcher in my office said they just had a report of an armed robbery in Arkansas. He told me it was a red Nova bearing tag number WS-5757. I got in the police car and drove possibly a half a block to the west which is the main highway through Stilwell. One of my men named Andy Morton was with me. When I reached the main highway I turned north and about a half a block I stated to Morton "there is the Nova right there," it was coming toward us. (T. 216) What you have shown me as State's Exhibit D is a photograph of the red Nova, the one I saw. The traffic was real heavy at the time. As we pulled by the car I looked back and saw the tag number that had been given to me. I also saw a man driving it and a television set sitting beside him in the seat. We were unable to turn around right there, but as soon as we could, we did and caught up with it with two or three cars in between us. We followed him south on the highway, I would say four or five blocks to a little convenient store. (T. 217) The car pulled up in front of this store, and the man got out and started into the store and we were behind him at that time. We hollered at him and he came back to our car. I believe that man is sitting here in the courtroom but he looks a lot different today then he did then. I do not recall what he was wearing that day. We informed him that we had a report on him

from Arkansas on a robbery charge and we took him to city hall, which is four or five blocks back to the north. I told him that we would have to hold him until Arkansas authorities got over there to take a look at him. We let him make a phone call and held him there in the jail until they came over to see him. According to our record the time that he was arrested was 1:10. I have had an opportunity to (T. 218) refresh my memory on that. I believe 1:10 would have been the time we checked him in at city hall. It is correct that we would have had to seen the car, followed it to the store and brought him back to the station before this time would have been recorded.

What you are showing me as State's Exhibit E is a photograph of the tag number and the rear view picture of the Nova. The first time that I observed the Nova with that tag number (T. 219) was when we were meeting it on the highway and I looked back and recognized the tag number. Upon stopping the man I did not search the interior of the car, I just had a viewing of it. Looking at what you have marked as State's Exhibit B, it looks like it might have been the television that was inside the car. I did not look that close. State's Exhibit C is a photograph which resembles the gun holster and the gun laying in the back seat. (T. 220) I cannot state that that correctly depicts how the gun was laying when I first observed it.

I transported the man back to the police station in the police car and my deputy, Mr. Morton, drove the man's car back to city hall.

ANDY MORTON, called as a witness on behalf of the state, testified as follows:

DIRECT EXAMINATION

My name is George Andrew Morton and I have been employed by the police department at Stilwell, Oklahoma since April of this year. I was on duty of May 11 of this year. (T. 225) I did respond to a call that date around the middle of the day, shortly before 1:00 p.m. or about 1:00 p.m. Chief Philpot was in the car with me along with Officer Buzz Cochran. Officer Cochran is deceased. It was an armed robbery call.

After the dispatcher told us an armed robber was heading toward Stilwell we went out to the car and proceeded to U.S. 59 where we met a red 1968 Chevrolet in the middle of the block. It was a (T. 226) Chevrolet Nova. What you are showing me as State's Exhibit D is a photograph of the Chevrolet Nova that I saw. We had been told that the license number of the car was Oklahoma WS-5757. Exhibit E is a photograph of the car and it was taken directly across the street from city hall in Stilwell. State's Exhibit D and E were both taken in the same location. (T. 227) When we saw that car we got turned around and followed it and then pulled in behind it. We saw the

gentleman get out of the car and start toward the store. We pulled in behind him and I jumped out and hollered at him. He turned around and came to me. I do see that gentleman in the courtroom here today. I asked him to take his hands out of his pockets and told him to step over by the car that the chief needed to talk to him. The chief asked him where he had got the stuff and he said he bought it. At that time Chief Philpot told him he needed to go down to city hall, that he had a (T. 228) lot of explaining to do. And the chief said this boy will drive your car in, this boy referring to me. I did drive the Nova to the station. I recall that there was a television set sitting in the front seat of the car. State's Exhibit B correctly show the inside of the car as I recall it. I did observe the back seat of the car and there was a muzzle loading gun and a buckskin scabbard with fringe. Exhibit C is a correct depiction of the way the gun was lying. I did not move any of the items in the car (T. 229) when I drove it to the station. I do recall that there was a green cap in the front seat. When I got to city hall I locked the car and watched it, upon directions from the chief.

I do recall that Officer Rexford and someone else arrived in Stilwell that day. I did maintain security on this car up to that point. I unlocked the car for Officer Rexford and he took these pictures. The defendant did appear to be dressed in normal clothes (T. 230) at the time. I believe he had on a red pullover shirt

and a pair of bluejeans. I do not remember any particularity about the pullover shirt, any design. I don't know if he had an opportunity to change clothes before we released him from our custody. We released him to the Washington County Sheriff's deputies. No I do not recall whether he changed clothes. When he left the station with the Washington County deputies I believe he was wearing the same clothes he was wearing when he was arrested. (T. 231)

* * *

CHARLES REXFORD, a witness for the State testified as follows:

I tried to stay as close to the suspect as possible in build and hair style, type of dress and everything. These were bust type shots. She was not able to pick out the person that we had in custody.

To the best of my recollection when I first met the defendant in Stilwell, Oklahoma his hair was just about like it is except it was a little messy, kind of mussed a little bit. He had a red pullover type shirt with a darker color part across the shoulders, just a two-tone type pullover shirt and Levi's jeans, and I did not notice what he was wearing as far as footwear. (T. 254) I do see the person that I encountered in Stilwell in the courtroom today. He is the defendant, sitting right there at the table.

CHARLES REXFORD, a witness for the State testified in rebuttal as follows:

> The photograph you have marked as State's Exhibit O is a photograph of the defendant taken at the time he was arrested and brought back from Stilwell on May 11. The defendant had not had an opportunity while in my custody to change clothing. The photograph represents a true and accurate representation of the person. What you have marked as identification as State's Exhibit J is a piece of paper shown to me on Friday by Mrs. Grace Johnson. She purported that the paper represented (T. 334) a rough sketch, drawing, of the suspect she saw on the day of the burglary.
>
> (The defense counsel objected to the drawing and in a conference in the bench, the court said it thought the defense had agreed to its admission. The defense said it had agreed to admission of the photograph but not the drawing.) (T. 338, 339, 340))
>
> The shoulders in the drawing bear a likeness to me.